

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7332

In The
United States Court of Appeals
For The Second Circuit

MERRILL LYNCH, PIERCE, FENNER & SMITH
INCORPORATED.

Plaintiff-Appellant.

vs.

COSTA LECOPULOS, a/k/a CONSTANTINOS
LEKOPOULOS,

Defendant-Appellee.

*On Appeal from the United States District Court for the
Southern District of New York.*

BRIEF FOR DEFENDANT-APPELLEE

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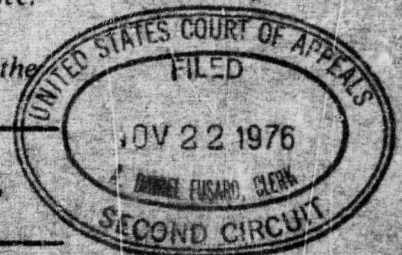


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In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 76-7332

MERRILL LYNCH, PIERCE, FENNER &
SMITH INCORPORATED,

Plaintiff-Appellant,

- against -

COSTA LECOPULOS, a/k/a
CONSTANTINOS LEKOPOULOS,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

QUESTIONS PRESENTED

1. Does the mere purchase of securities on a New York exchange, by a New York securities dealer on behalf of a foreign customer of the dealer's foreign affiliate, confer personal jurisdiction over the customer under New York's long-arm statute, in a suit by the dealer against the customer?

2. Does an agreement between a foreign citizen and a corporation doing business in New York, to arbitrate disputes in New York, constitute a consent to jurisdiction by New York courts over the foreign citizen, in an action for damages?

3. May an appellate court direct arbitration in the face of factual issues unresolved by the trial court?

STATEMENT OF THE CASE

In October 1974, certain employees of Merrill Lynch, Pierce, Fenner & Smith Ltd. ("Merrill Lynch Ltd."), an indirect affiliate of the plaintiff-appellant, Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") (48a)* travelled to Athens from London for the purpose of soliciting the opening of accounts at Merrill Lynch Ltd. and had discussions with the defendant-appellee, Costa Lecopulos ("Lecopulos"), a citizen and resident of Greece (40a).

*Page references in parentheses are to Joint Appendix

As a result, Lecopulos travelled to London and, on or about November 5, 1974, opened a commodity futures account with Merrill Lynch Ltd., depositing \$500,000 therein (40a, 15a). Consequently, a number of sugar futures contracts were bought and sold on the New York and London exchanges (15a-21a), at first on instructions from Lecopulos and later at the discretion of Merrill Lynch or its British affiliate. All of Lecopulos' contacts were exclusively with employees of Merrill Lynch Ltd. in London and occurred while Lecopulos was in London, Geneva and Athens (40a).

As a result of the actions of Merrill Lynch and Merrill Lynch Ltd. in the course of the trading which occurred following the opening of Lecopulos' account, he lost his initial deposit of \$500,000 and his account was finally closed out on December 19, 1974, showing a debit balance of \$105,846.01, which Merrill Lynch seeks to recover (21a).

At the time of, and following the opening of the account, Lecopulos, who does not speak English, executed certain documents in the English language, which he did not understand. Lecopulos denies that he was ever made aware of the fact that one of these, the Commodity Account Agreement (53a), contained a clause providing for arbitration of disputes in New York (61a).

On January 6, 1975, Merrill Lynch obtained an order of attachment against the property of Lecopulos in Supreme Court, New York County, but no property was attached. On March 5, 1975, the summons and complaint was served on

Lecopulos in Athens. The complaint sets forth a straightforward cause of action for money damages. It contains no reservation of a right to arbitrate, nor does it even mention arbitration. Lecopulos removed the action to the district court. Merrill Lynch moved to compel arbitration and Lecopulos moved to dismiss for lack of personal jurisdiction. Judge Cannella granted Lecopulos' motion in the order which is the subject of this appeal.

POINT I

LECOPULOS IS NOT SUBJECT TO JURISDICTION IN NEW YORK

- A. Under The Law of New York, As Enunciated In Haar v. Armendaris, An Agent Cannot Create Jurisdiction Over His Principal In New York Solely Through The Acts Of The Agent Performed In New York

In 1963, the New York Legislature enacted New York's long-arm statute, CPLR §302(a)(1), which reads in part as follows:

"As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent:

1. transacts any business within the state; ..."

It would be an understatement to say that, for at least the first decade of its existence, the decisions under §302(a)(1) have not provided the legal community with a

shining example of judicial consistency. Fortunately, however, with respect to at least one problem area, the effects of an agent's acts on his ability to confer upon the courts in personam jurisdiction over his principal, in a suit by the agent against the principal, the law has been crystal clear since the New York Court of Appeals, in 1973, decided the landmark case of Haar v. Armendaris Corp., 31 N.Y.2d 1040, 342 N.Y.S.2d 70 (1973), rev'g 40 App. Div.2d 769, 337 N.Y.S.2d 285 (1st Dep't 1972). That case involved a suit by an attorney against his client for services rendered and disbursements incurred by the lawyer in New York on behalf of his out-of-state client. Supreme Court, New York County, in an unreported order entered May 24, 1972, denied defendant's motion to dismiss for lack of personal jurisdiction. The Appellate Division, First Department, affirmed by a divided opinion. The two dissenting justices stated:

"This is not an action between defendant and a third party, but rather between plaintiff as agent for defendant and defendant-principal. In the former situation I would not hesitate to find jurisdiction, but I conclude differently under the facts of this case...[T]he present plaintiff is relying on his own activities within the State, rather than on defendant's independent activities. This record fails to disclose any 'purposeful activity' engaged in by defendant itself within this State, out of which this action arose, so as to render it subject to our jurisdiction in the plaintiff's action against it." 40 App. Div.2d 769, 770, 337 N.Y.S.2d 287-88.

The Court of Appeals reversed "on the Appellate Division's dissent".

Appellant seeks to make much of the famous - or infamous, depending on one's point of view - Footnote 2 in Parke-Bernet Galleries Inc. v. Franklyn, 26 N.Y.2d 13, 19, 308 N.Y.S.2d 337, 341-342, (1970), cited at p.9 of its brief and also cited by the dissenting opinion in the Appellate Division in Haar:

"The present case differs materially from others, relied upon by the defendant, in which we have denied jurisdiction. (See Glassman v. Hyder, 23 N.Y.2d 354; Standard Wine & Liq. Co. v. Bombay Spirits Co., 20 N.Y.2d 13; McKee Elec. Co. v. Rauland-Borg Corp., 20 N.Y.2d 377, supra; Kramer v. Vogl, 17 N.Y.2d 27.) It is sufficient to point out that in each of those cases, all of which involved agents who were suing their principals, the plaintiff was relying on his own activities within the State, and not those of the defendant, as the basis for jurisdiction. In other words, in no one of these cases had the defendant himself engaged in purposeful activity within the State nor had the cause of action arisen out of transactions with third parties conducted through an agent."

At first glance, this footnote may suggest some distinction between situations in which the agent's cause of action derives from his own activities and those in which his cause of action derives from transactions between third parties and the agent acting on behalf of his principal. It is not entirely clear what the Court of Appeals had in mind in the last sentence of the footnote, which, in any case, is mere dictum. But, since it is difficult to conceive of activities by an agent, whether he be a sales representative,

a distributor, a lawyer or a broker, which do not involve some "transactions with third parties", the court presumably meant no more than that, in a suit by a third party against the out-of-state principal, jurisdiction over the principal would not be found wanting merely because the cause of action arose from a transaction between the third party and the principal's agent.

Indeed, this interpretation is supported by the language in the Haar dissent, which is now the law of the Court of Appeals, emphasizing that "This is not an action between defendant and a third party, but rather between plaintiff as agent for defendant and defendant-principal." 40 App. Div. 2d 770, 337 N.Y.S.2d 287.

Peterfreund and McLaughlin take the same view:

"When the action is between a third person who dealt with the defendant's agent in New York, Parke-Bernet holds that the agent's acts will be attributed to the principal for jurisdictional purposes. There is also authority that when the suit is between a third person who dealt with an independent contractor and the 'principal', the acts of the independent contractor may be attributed to the 'principal'. Elman v. Belson, 32 A.D.2d 422, 302 N.Y.S.2d 961 (2d Dep't 1969). Support for this position has been extracted from footnote 10* to the opinion in Parke-Bernet." H. Peterfreund and J. McLaughlin, New York Practice - Cases and Other Materials 292 (3d ed. 1973).

At any rate, we need not strain to discern the hidden meaning of the Parke-Bernet dictum, since the law of New York is now clear and unambiguous on the point in question. Neither

*Footnote 10 is the famous footnote 2, renumbered by the authors.

Haar, nor any of the cases following it, contain the slightest hint that causes of action arising from transactions between the agent and a third party are excepted from the rule that the agent may not bootstrap himself into creating a basis for jurisdiction over his principal solely through his own acts performed for his principal. "Where jurisdiction depends wholly on the 'long-arm' of CPLR 302(subd[a], par. 1), in that the foreign corporation 'transacts any business within the state', the agent performing the transaction cannot use the statute to sue his principal". Traub v. Robertson-American Corp., 82 Misc.2d 222, 223-24, 368 N.Y.S.2d 958, 961 (Sup. Ct. 1975). "Where the action is by the agent or independent contractor against the non-resident principal,...the New York activities of the agent will not be attributed to the non-domiciliary principal". Galgay v. Bulletin Company, Inc., 504 F.2d 1062, 1065 (2d Cir. 1974).

With one exception, Note, New York's Long Arm Jurisdiction: The Case For The Agent-Plaintiff, 41 Eklyn. L. Rev. 625 (1975), the commentators, while not unanimous in their praise of the Haar rule, seem to be unanimous in its interpretation:

"Synthesizing the cases, the following conclusions appear to emerge: (1) When an action is brought by a so-called 'agent' against his principal the activities of the agent in New York will not be attributed to the non-domiciliary defendant for purposes of CPLR 302; (2) a fortiori, the activities of an independent contractor will not be attributed to the non-domiciliary in an action between the contractor and the non-domiciliary; and (3) when the action is between a third party who dealt with a representative of the non-domiciliary in this state,

the activities of that representative will be imputed to the non-domiciliary when he requested the performance of those acts in New York and those acts benefit him, and this is true without regard to whether the representative is an agent or an independent contractor." Practice Commentary C 302:3, CPLR §302 (McKinney Supp. 1974) (McLaughlin, Commentator).

"[I]t now appears to be the rule that in a suit between a true agent and his principal, the acts of the agent will not be imputed to the principal for purposes of jurisdiction". H. Peterfreund and J. McLaughlin, New York Practice - Cases and Other Materials 292 (3d ed. 1973).

"[In Haar] the Court of Appeals appears to have resolved any confusion that existed as a result of its footnote in the Parke-Bernet case by holding that in an action by an agent against his foreign principal, the acts of the agent will not be attributable to the principal for jurisdictional purposes." Birnbaum, Civil Practice, 1973 Survey of N.Y. Law, 25 Syracuse L. Rev. 339 (1974).

And, of course, there is the statement of the Haar rule by Judge Cannella in the decision below:

"An agent's own activities in New York on behalf of his principal may not, in a suit by the agent against the principal, be attributed to the principal so as to become acts of the principal within New York for jurisdictional purposes." (63a-64a).

In arriving at his decision, Judge Cannella expressed his agreement with Judge Knapp's analysis in Merrill Lynch, Pierce, Fenner & Smith Inc. v. Alexiou, 397 F. Supp. 1292 (S.D.N.Y. 1975), "on almost identical facts".

Judge Knapp's analysis of the Haar rule, as applied to the facts of the Alexiou case - which, as noted, are virtually identical to those of the case at bar - is illuminating. Far from considering Haar some sort of judicial aberration due to a momentary lapse of attention by the Court of Appeals,

Judge Knapp places Haar squarely within the mainstream of New York long-arm jurisprudence: "Ordinarily, New York courts have been extremely reluctant to permit an agent to bootstrap himself into jurisdiction over a non-domiciliary principal by means of the agent's own unilateral activities in New York", supra at 1293, citing Haar, Parke-Bernet, supra (pre-Haar), Traub, supra (post-Haar) and Hertz, Newmark & Warner v. Fischman, infra (pre-Haar). "This", says Judge Knapp,

"is because due process requires that the non-domiciliary defendant himself have had some meaningful contact with the forum state. It is essential that, before personal jurisdiction may be obtained in such circumstances, the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'. Hanson v. Denckla (1958) 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283. New York has been extremely reluctant to find such 'purposeful' availment where the defendant is claimed to have acted within the state only through the agency of the plaintiff suing him." Id., at 1293.

Although Judge Knapp does not refer to International Shoe Co. v. Washington, 326 U.S. 310 (1945), which is the cornerstone of all long-arm jurisprudence, there lurks in the background of his analysis the famous holding of that case:

"...[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." at 316.

Before we leave Alexiou, something should be said about appellant's disingenuous attempt, in the footnote on p.8 of its brief, to distinguish that case from the present one. Appellant argues, first, that Alexiou "did not consider the argument that a defendant consents to jurisdiction in New York by signing an agreement to arbitrate" here. This statement is true, and will be dealt with in Point II below.

Next, appellant argues that, "as regards New York long-arm jurisdiction, the Alexiou opinion was based upon one particular sale transaction rather than a volume of business conducted in New York over a substantial period of time". The contrary is true, as appears from footnote 2 of Judge Knapp's decision:

"Although defendant apparently initiated numerous transactions in his account with plaintiff, plaintiff has chosen to focus on one particular sale in New York Sugar 11 contracts as a basis of jurisdiction, in which defendant utilized a telephone located in the office of plaintiff's London office to place his sell order." 397 F. Supp. 1294, n.2.

In other words, both Alexiou and Lecopulos "initiated numerous transactions" in New York, but Alexiou himself also made one telephone call directly to New York, which Lecopulos never did. Thus, if Judge Knapp's holding is correct as to Alexiou, it must be correct, a fortiori, as to Lecopulos.

Next, "Merrill Lynch submits that the Alexiou decision is wrong insofar as it holds under New York law that acts of a New York agent may not be imputed to its foreign principal

even when the foreign principal expressly ordered the agent to act in New York". This merely amounts to saying that Merrill Lynch disagrees with the Haar rule, since, as Judge Knapp points out in his incisive analysis of the respective fact situations, there is no way to distinguish between them as to the specificity of the orders given by the principal to his agent: In Alexiou, as in Haar,

"defendant engaged plaintiff to act as his agent to perform work which could only be done in New York (here, trading in a certain contract which exists only in New York and in Haar, negotiating a contract with a corporation situated in New York)" 397 F. Supp 1294.

Merrill Lynch is, of course, free to disagree with the law of New York, but it must know that, in this appeal, this court must apply New York law as it currently stands. Mullaney v. Wilbur, 421 U.S. 684 (1974); Fontanetta v. American Board of Internal Medicine, 421 F.2d 355 (2d Cir. 1970).

Finally, Merrill Lynch states that, when it appealed the Alexiou decision to this court, Alexiou consented to personal jurisdiction. It appears that the reason for such consent was Alexiou's desire to assert a counter-claim, so it hardly speaks to the question of whether his original defense of lack of jurisdiction was validly raised or not.

The three post-Haar cases cited at pp. 12-14 of appellant's brief can be quickly disposed of. Hi Fashion Wigs v. Peter Hammond Advertising, Inc., 32 N.Y.2d 583, 347 N.Y.S.2d 47 (1973), Margaret Watherston, Inc. v. Forman, 70 Misc.2d 539, 334 N.Y.S.2d 35 (Civ. Ct. N.Y.Co. 1972), aff'd. 73

Misc.2d 875, 342 N.Y.S.2d 744 (App. T. 1st Dept. 1973) and Del Bello v. Japanese Steak House, Inc., 43 App. Div.2d 455, 352 N.Y.S.2d 537 (4th Dep't. 1974), may raise some question as to whether the Haar anti-bootstrapping rule applies to independent contractors as well as agents (there is no suggestion in Haar that it does), but they in no way diminish the force of that rule as applied to agents. Merrill Lynch states, at p.15 of its brief, that its "activity in executing Lecopulos' orders on the New York Coffee & Sugar Exchange was carried out as his agent". Merrill Lynch cannot have it both ways.

B. The Decision Below Is In Accord With "Traditional Notions of Fair Play and Substantial Justice"

Reference has been made above* to the International Shoe doctrine that, while there is no absolute constitutional impediment to the assertion of in personam jurisdiction over a non-consenting foreign defendant, it is subject to a due process requirement which guarantees that "maintenance of the suit does not offend traditional notions of fair play and substantial justice". While appellee is satisfied that he is not subject to personal jurisdiction in New York under the cases discussed above, it is never inappropriate to speak of justice in a court of justice. This is not an orphans-and-widows case. Nor, on the other hand, is it the typical case so dear to the critics of Haar v. Armendaris, involving the "little guy" in New York, "protecting his interests against a large foreign corporation", Note,

*p. 9

New York's Long-Arm Jurisdiction: The Case for the Agent-Plaintiff, 41 Bklyn. L. Rev. 625, 663 (1975). Lecopulos believes that, if and when this dispute goes to trial on the merits in the proper forum, he will be able to show the following: Far from his soliciting Merrill Lynch (New York) to act for him, it was Merrill Lynch Ltd. (London) which aggressively solicited his business and which failed to observe elementary prudence, as well as its internal rules, in getting him, an almost total novice in the commodity futures field, involved "over his head". Far from his enjoying the benefit of transacting business in New York, on which much long-arm jurisdiction is based, his "benefit" was the precipitous loss of half a million dollars, due in large part to Merrill Lynch's negligence in handling his account (43a). Far from his engaging in "purposeful activity" in New York or "seeking the protection of New York's laws", all of his contacts were with Merrill Lynch Ltd. in Athens and London. The fact that New York was the site of one of the Exchanges on which he traded during his brief and disastrous venture (the other being London) was a mere incidental result of the structure of the commodity futures market.

To force Lecopulos to give up, temporarily, his business in Athens and travel 5,000 miles to New York for what could well turn out to be protracted litigation would add insult to injury and "offend traditional notions of fair play and substantial justice".

Merrill Lynch, on the other hand, is the largest

securities firm in the world, with offices in 39 states, 2 territories and 23 foreign countries, including Korea, Kuwait and the United Arab Emirates. If the position urged upon this court by Merrill Lynch should prevail, it would come as a great surprise to its customers in all these far-flung places to learn that, by opening accounts with the local Merrill Lynch office for the purchase of any kind of securities on any New York Exchange, they had subjected themselves to the jurisdiction of the New York courts in any dispute concerning such account between them and Merrill Lynch. It would also come as a surprise and, one might think, an intolerable burden, to state and federal courts in this area if, at some future crisis point in the international economy, resulting in massive defaults by the customers of Merrill Lynch and other New York securities firms, the courts were inundated by a flood of suits against such customers located in every state of the Union and every corner of the world.

One recent New York case is completely in point. In Drexel Burnham & Co. v. Silverman, 75 Misc.2d 904, 349 N.Y.S.2d 293 (Civ. Ct. N.Y.Co. 1973), plaintiff, a New York stockbroker, sued in New York to recover an alleged balance due on the purchase of stock on the New York Stock Exchange. The purchase order had been placed by defendant, a Pennsylvania resident, with a Philadelphia broker acting as plaintiff's local representative. Plaintiff claimed in personam jurisdiction based on CPLR 302(a)(1), but Judge Sherman

granted defendant's motion to dismiss, holding as follows:

"There was a face to face transaction between the defendants and their broker in Pennsylvania at the conclusion of which all further action on the part of the defendants ceased. The incidental circumstances that following all action by the defendants, their local broker undertook the interstate activity of placing a telephone call order to New York surely will not provide the basis for 'long-arm' jurisdiction. This is different from the situation in the case of Park-Bernet [sic] Galleries v. Franklyn (26 N.Y.2d 13), where the defendant principal actually regulated by open telephone lines the conduct of his agent in New York who was transacting business on his behalf.

It would be preposterous to suggest that a buyer at a national retail chain would be subject to long-arm jurisdiction as a result of a subsequent order placed to a warehouse in a foreign State by the local branch seller. This is the result sought here. Moreover jurisdictional abrogation is not contemplated by existing law. The plaintiff entered Pennsylvania to harvest economic benefits by representing local interests. It cannot enjoy these benefits and avoid the impact of litigation in such local forum by hiding behind New York jurisdictional statutes." 75 Misc.2d 905, 349 N.Y.S.2d 294, emphasis supplied.

Another case involving a jurisdictional dispute between a multinational company and an individual was Frummer v. Hilton Hotels International, Inc., 19 N.Y.2d 533, 281 N.Y.S.2d 41 (1967), cert. denied, 389 U.S. 923 (1967). There, Hilton (U.K.) was unsuccessful in escaping in personam jurisdiction in New York, in a suit brought against it by a New York resident involving a cause of action arising out of plaintiff's stay at defendant's hotel in London. The Court of Appeals found jurisdiction in New York over the British company based on its operation, in New York, of a reservations service for its British hotels, and commented as follows on

the equitable aspect of the case:

"We are not unmindful that litigation in a foreign jurisdiction is a burdensome inconvenience for any company. However, it is part of the price which may properly be demanded of those who extensively engage in international trade. When their activities abroad, either directly or through an agent, become as widespread and energetic as the activities in New York conducted by Hilton (U.K.), they receive considerable benefits from such foreign business and may not be heard to complain about the burdens." 19 N.Y.2d 538, 281 N.Y.S.2d 45.

Both cases have a clear message for companies engaged in extensive foreign operations: Litigate with your customers where you go to great lengths to find them, not where it is most convenient for you and most inconvenient for them.

C. The New York Cases Involving
Securities Dealers-Plaintiffs
Are Unanimous in Denying Personal
Jurisdiction Over Their Out-Of-
State Customers

In addition to this case and Alexiou and Drexel Burnham, discussed above*, there are two other cases involving attempts by New York securities dealers to sue their out-of-state customers in New York, Hertz, Newmark & Warner v. Jerome Fischman, 53 Misc.2d 418, 279 N.Y.S.2d 97 (Civ. Ct. N.Y.Co. 1967) and Helper Commodities Corp. v. Pellegrino, 390 F. Supp. 520 (S.D.N.Y. 1975).

In Hertz, decided long before Haar, an action by a New York stock broker against a New Jersey customer who had traded in securities on the New York Stock Exchange through

*pp. 8-11, 14-15

the broker's New Jersey office, was dismissed for lack of personal jurisdiction on the ground that, "where the agent and not a third party sues the principal, the agent's acts will confer jurisdiction over the principal only if the agency was an exclusive one", 53 Misc.2d 421, citing Millner Co. v. Noudar, Lda., 24 App. Div.2d 326, 266 N.Y.S.2d 289 (1st Dep't. 1966).

In Helfer, a case almost identical with the instant one on its facts, jurisdiction over an Illinois customer was found by Judge Brieant to be wanting, despite the fact that "defendant assumed an active role in the management of his commodities speculations and would give specific instructions to plaintiff's personnel concerning trades to be executed on his behalf on the floor of the New York Mercantile Exchange, Inc. and the Commodity Exchange, Inc., commodity futures exchanges located in New York City...by lengthy collect telephone calls to plaintiff's New York office", 390 F. Supp. 520, 521. The decision was based squarely on Haar v. Armendaris, supra, which Judge Brieant criticized as "an illogical judicially imposed gloss", but which he felt bound to follow, at 521, under the authority of Klages v. Cohen, 146 F.2d 641, 644 (2d Cir. 1945):

"[I]t is not the function of federal courts to examine the correctness of decisions of the courts of a state whose law is to be applied in the federal court".

Thus, every case involving securities dealers-plaintiffs - even those, like Hertz, involving facts more favorable to the plaintiff than those present here - accords squarely with the decision under appeal. Counsel for appellee has

been unable to find any cases to the contrary.

D. Lecopulos Has Not Been "Doing
Business" In New York Within
The Meaning of CPLR 301

Appellant argues, at pp. 15-17 of its brief, that CPLR 301 is an independant source of jurisdiction over a defendant who "does business" in the state of New York. This statement is true as far as it goes, but it bears no relevance whatsoever to the case at bar. The cases cited by appellant all involve fact situations containing contacts with New York State far in excess of anything present in the instant case, under the most favorable interpretation of its facts. If the question of jurisdiction under 302(a) (1) is resolved in favor of defendant-appellee, it follows, a fortiori, that there can be no jurisdiction under 301.

POINT II

AN AGREEMENT TO ARBITRATE IS
NOT A CONSENT TO GENERAL
JURISDICTION

Merrill Lynch argues at length that the agreement to arbitrate under the rules of the New York Stock Exchange constituted a consent to jurisdiction of the courts in New York. In making the argument it carefully refrains from considering the nature and extent of the jurisdiction conferred and how it may be invoked.

Assuming for the purpose of argument that a binding agreement to arbitrate in New York was entered into, and that the agreement constitutes some kind of a consent to jurisdiction, there still must be a proper act to bring a party within the power of the arbitrators or the court. Such acts include the service of a notice of intention to arbitrate or a demand for arbitration, properly served in accordance with the applicable statute, or the making of a motion in a pending action to compel arbitration.

Prior to the order of the court below no demand for arbitration or notice of intention to arbitrate was served.*

*After the court below ordered the action dismissed, Merrill Lynch served Lecopulos with a Notice of Intention to Arbitrate pursuant to the New York Civil Practice Law and Rules. The notice, in accordance with CPLR §7503, states that unless Lecopulos moves within twenty days he is barred from objecting that there is no valid agreement to arbitrate.

A motion in a pending action to compel arbitration is provided for by New York law, CPLR §7503(a), and also by Section 4 of the United States Arbitration Act, 9 U.S.C. §4. But such a motion presumes a pending action, for a motion cannot be made in limbo. And an action without jurisdiction of the defendant is no better a vehicle in which to grant relief than no action at all. A court has no more power to compel arbitration against a party not before it than it does to issue a preliminary injunction or enter a judgment for damages.

Any consent to jurisdiction which is implied from the execution of an agreement to arbitrate is a consent limited to matters concerning arbitration. It is certainly not a consent to be sued in an action for damages, as Merrill Lynch would have it. Just as a demand for arbitration or a notice of intention to arbitrate require proper service to be effective, so does an action in which a motion is made. Lecopulos was served with a summons and complaint, which was ineffective to bring him before the court. He was never (until the belated notice of intention to arbitrate mentioned above) served with any notice indicating that Merrill Lynch desired to arbitrate. The only notice was the motion served on his attorneys, whose only reason for appearing was to contest the jurisdiction of the court below.

POINT III

THIS COURT SHOULD NOT DIRECT
ARBITRATION UNTIL THE DISTRICT
COURT HAS RESOLVED DISPUTED
FACTUAL ISSUES

The district court, finding itself without jurisdiction, properly dismissed the action without consideration of the other issues presented by Lecopulos. Even if this court should determine that there was jurisdiction of Lecopulos, there remain a number of questions which must be determined before arbitration can be directed. These should be resolved, in the first instance, in the district court. Four of these issues are particularly compelling: 1) whether a binding agreement to arbitrate was ever entered into by Lecopulos, 2) whether Merrill Lynch waived any right it had to arbitrate, 3) whether the agreement to arbitrate in New York, if it exists, is unconscionable, and therefore unenforceable, and 4) whether Merrill Lynch is barred from seeking arbitration by the time limitation contained in its own arbitration agreement.

There is no agreement to arbitrate. Merrill Lynch rests its claim that its dispute is arbitrable on the existence of a writing, signed by Lecopulos, which contains an arbitration provision. The writing, however, is simply a card printed in small type. It is written in English, a language which Lecopulos does not speak, read or write. No one explained that the card even purported to be a contract of any kind, let alone one

requiring arbitration of disputes (61a).

There are, of course, cases which hold that one who executes a contract in a foreign language is bound by its terms. But that presumes a knowledge that the writing is indeed a contract. The card in this case has none of the characteristics of a formal contract. It resembles, if anything, a signature card used by banks. It was presented to Lecopulos simply as one of the documents he had to sign in order to open an account. Something much closer to a meeting of the minds is necessary before he can be bound to its arbitration provision.

Merrill Lynch waived any right it had to arbitrate.

Despite its present assertion that arbitration is the exclusive means to resolve its claim, Merrill Lynch commenced this action seeking a judgment for damages. The complaint does not reserve any right to arbitrate, nor is the word "arbitration" even mentioned in the pleading. Merrill Lynch frankly concedes that it commenced an action so that it could initially procure an order of attachment, which in fact it did. Unable to find any property of Lecopulos to attach, Merrill Lynch nevertheless proceeded to serve the summons and complaint in Athens. Merrill Lynch concedes that it caused service to be made within sixty days of the issuance of the order of attachment so that the attachment order would be preserved under CPLR §6213.

Under New York law (and this action was commenced in a New York state court) the commencement of an action for damages constitutes a waiver of the plaintiff's right to arbitrate the claim sued upon. Matter of Zimmerman (Cohen), 236 N.Y. 15 (1923). Merrill Lynch argued below that federal, not New York, law determines the issue, and that under federal law there is no waiver until issue has been joined in the action. Whatever federal law may be, the purported arbitration clause, contained in Merrill Lynch's own agreement, expressly provides that "This agreement and its enforcement shall be governed by the laws of the State of New York" (emphasis supplied). No clearer expression could be found that Merrill Lynch intended that New York law should apply to the procedural as well as substantive aspects of any dispute. This is confirmed by the preceding provision in the agreement, "Arbitration must be commenced within one year after the cause of action accrued by service upon either party of a written demand for arbitration or a written notice of intention to arbitrate ...". The United States Arbitration Act contains no provision for a demand for arbitration or for a notice of intention to arbitrate. These are devices created by New York's arbitration statute, CPLR §7503(c).^{*} Having chosen New

^{*}As noted in Point II above Merrill Lynch, after the dismissal of the action in the district court, served a notice of intention to arbitrate pursuant to CPLR §7503. This reliance on New York law constitutes a total abandonment of any contention that New York law is not applicable.

York law, and having sought to impose that choice on Lecopulos in what is clearly a contract of adhesion, Merrill Lynch cannot change its mind when it realizes that federal law would provide it with greater benefit.

It is far from clear that federal law is any different in this respect from New York law. It is true that dicta can be found in many cases to the effect that until issue has been joined in an action there has been no waiver of the plaintiff's right to arbitrate. In no reported case has that precise issue been faced, however, except in Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc., 62 F.2d 1004, 1006, in which Judge Learned Hand stated flatly that the commencement of a state court action "was indeed a repudiation of the plaintiff's own promise to arbitrate."

In this case Merrill Lynch not only elected to proceed by an action, but did so for the purpose of procuring an attachment. This was unequivocally a waiver of arbitration under both federal and New York law, for an attachment is a measure only available in litigation. When a party chooses arbitration over litigation, it is to obtain the presumed advantages of expedition, simplicity and economy. In doing so the claimant is willing to forego the advantages which are available only in litigation: disclosure, motion practice, trial by jury, the right to appeal -- and the provisional remedies of attachment, injunction, receivership and arrest.

Merrill Lynch believes that it is entitled to the best of both worlds: that it can commence an action and obtain an attachment, and then move to stay its own action and compel arbitration. No reported case has ever held that this is permissible. The only authority in support of Merrill Lynch's position is a statement in The Anaconda v. American Sugar Co., 322 U.S. 42, 44 (1943):

"The section [§3 of the United States Arbitration Act] obviously envisages action in a court on a cause of action and does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate. And, it would seem there is nothing to prevent the plaintiff from commencing the action by attachment if such procedure is available under the applicable law. This section deals with suits at law or in equity."

That statement, prefaced as it is with the words, "it would seem" is so conjectural that it does not even rise to the level of dictum. To the contrary, Section 8 of the United States Arbitration Act, 9 U.S.C. §8, compellingly indicates that procuring an attachment is indeed a waiver of the right to arbitrate. Section 8 provides that in maritime cases the court has jurisdiction to direct arbitration after the libel and seizure of a vessel. Under the rule inclusio unius est exclusio alterius, it is clear that what is expressly permitted in maritime cases is not permissible in other actions. If such procedure were available generally there would be no need to authorize it in one narrow class of cases.

New York law is even clearer. In Matter of Young v. Crescent Development Corp., 240 N.Y. 244 (1925), it was held that the mere filing of a mechanic's lien, without the commencing of an action to foreclose it, was a waiver of the claimant's right to arbitrate. (That rule was subsequently changed by statute, New York Lien Law §35, but only as it applies to mechanic's liens.)

The arbitration agreement is unconscionable. Merrill Lynch sent its representative to Athens to solicit Lecopulos' account, which he actually opened on a trip to London. The persons he dealt with were not even employees of Merrill Lynch, but were employed by an English corporation separated by no less than five different corporate entities from the holding company which in turn owns the stock of Merrill Lynch. Lecopulos never set foot in the United States nor himself communicated to the United States in connection with the account. Yet Merrill Lynch now seeks to force him into a New York arbitration where it can act on its home ground, but where Lecopulos does not even speak the language. Lecopulos would have to travel thousands of miles to prepare for and attend hearings, at great direct expense and probably greater indirect expense to his business at home. Merrill Lynch, with offices throughout the world, did not choose New York as a forum by whim. It seeks to enforce its choice of forum knowing it will exert overwhelming and unfair leverage. The cost to Lecopulos of resolving

Merrill Lynch's claim in New York will be so great that he will lose even if he wins. Beyond the matter of cost and convenience is the fact that there are no witnesses in the United States and discovery in an arbitration is at the whim of the arbitrators. This presents a grave problem in achieving a fair hearing.

Proceedings to compel arbitration are equitable in nature, Petition of Ropner Shipping Co. (The Hurworth), 118 F.Supp. 919 (S.D.N.Y. 1954). The maxim, "He who seeks equity must do equity", applies here with full force. This equitable rule has now been extended to actions at law. Uniform Commercial Code Sec. 2-302 provides that unconscionable contracts, or provisions in contracts, shall not be enforced, and Sec. 1-203 of the Code imposes an obligation of good faith in the enforcement of contracts.

The agreement to arbitrate disputes in New York, even if otherwise binding, is unconscionable and should not be enforced.

Arbitration is barred by the contractual limitations period. Merrill Lynch's contract contains the provision:

"Arbitration must be commenced within one year after the cause of action accrued by service upon either party of a written demand for arbitration or a written notice of intention to arbitrate, naming therein the arbitration tribunal."

No demand for arbitration or notice of intention to arbitrate was served upon Lecopulos until after the order of

the district court dismissing the action, far more than a year after the claim arose.

Merrill Lynch is bound by a strict interpretation of its contract of adhesion. In its greed to procure an attachment it failed to comply with the requirements of the agreement it drafted. It is therefore too late for it to demand arbitration.

CONCLUSION

The order of the district court should be affirmed. Alternatively, if jurisdiction of appellee should be found, the case should be remanded to the district court for resolution of the undecided issues.

Dated: New York, New York
November 22, 1976

Respectfully submitted,
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Of Counsel:

Peter Weiss
Ellen J. Seeherman

STATUTES CITED

This Appendix sets forth texts of statutes not included in "Statutes Cited" in Plaintiff-Appellant's brief.

CPLR §7503. Application to compel or stay arbitration; stay of action; notice of intention to arbitrate.

(a) Application to compel arbitration; stay of action. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration...

(c) Notice of intention to arbitrate. A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time...

New York Lien Law §35.

The filing of a notice of lien shall not be a waiver of any rights of arbitration of a contractor, sub-contractor, material man or laborer secured to him by his contract to furnish labor or materials...

Uniform Commercial Code §1-203.

Every contract within this Act imposes an obligation of good faith in its performance or enforcement.

Uniform Commercial Code §2-302.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

A 202 Affidavit of Personal Service of Papers
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

PIERCE, LYNN PIERCE, FENNER &
SMITH, INC.,

Plaintiff - Appellant.
- against -

COSTA LECOPULOS, et al.,

Defendant - Appellee

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 22nd day of November 1976 at 1 Liberty Plaza New York, N.Y.

deponent served the annexed brief

upon

Brown, Wood, Ivey, Mitchell & Petty Attn.: E. Michael Brady

the attorneys in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 22nd
day of November 1976

Beth A. Hirsh
BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-46-3156
Qualified in Queens County
Commission Expires March 30, 1978

Kevin E. Thomas

Print name beneath signature

KEVIN E. THOMAS